

BEFORE THE
BOARD OF PSYCHOLOGY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against:)	
)	Case No. X-28
MICHAEL ANTHONY FRAGA)	
1446 Mallory Way)	OAH No. N 1998010164
Rohnert Park, CA 94928)	
)	
Applicant/Respondent.)	
)	

DECISION AFTER NONADOPTION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Santa Rosa, California on February 19, 1998.

Complainant Thomas O'Connor, Executive Officer of the Board of Psychology, was represented by Kerry Weisel, Deputy Attorney General.

Respondent Michael Anthony Fraga was present and was represented by Frederick John Engbarth, Attorney at Law.

The record was held open in order to allow the parties to submit written argument. The parties' closing arguments were received on March 31, 1998 and were marked as complainant's Exhibit 6 and respondent's Exhibit T for identification. Also received on March 31 was a declaration from Ms. Weisel to which was attached the Department of Motor Vehicles' "Alcohol Impairment Charts." The declaration and charts were marked collectively as Exhibit 7 for identification. Complainant's request that official notice be taken of the DMV charts is granted. On April 2, complainant submitted additional closing argument on the issue of probation monitoring costs along with a letter from Ms. Weisel in which she acknowledged that the Board was withdrawing its request for cost recovery. The additional argument and letter were marked collectively as Exhibit 8 for identification. Respondent's reply brief was received on April 6 and was marked as Exhibit U for identification. Complainant's reply brief was

received on April 8 and was marked as Exhibit 9 for identification. The record was thereupon closed on April 8, 1998.

On May 8, 1998, the Board of Psychology issued a Notice of Non-Adoption of Proposed Decision.

Thereafter, the parties were given the opportunity to submit written argument. Respondent submitted written argument dated August 13, 1998. Written argument was not received from the Deputy Attorney General.

The parties were also given the opportunity to present oral argument after non-adoption, which took place at the Board's regularly-scheduled public meeting on August 28, 1998, in San Jose, California. Administrative Law Judge Jonathan Lew presided. Attorney Frederick John Engbarth represented Michael Anthony Fraga, who was present. Deputy Attorney General Kerry Weisel represented the complainant.

After consideration of all oral and documentary evidence, including the transcript of the hearing held on February 19, 1998, the written argument after nonadoption, and the oral presentations at the August 28, 1998 Board meeting, the Board hereby renders its own decision in this matter.

FINDINGS OF FACT

1. On July 1, 1997, Michael Anthony Fraga (respondent) filed with the Board of Psychology (Board) an application for registration as a psychologist. Complainant asserts respondent's application is subject to denial because he failed to disclose material facts on an earlier application for registration as a psychological assistant; because he had been convicted in 1982 of a crime substantially related to the qualifications, functions and duties of a psychologist; and because he had used controlled substances and alcoholic beverages to an extent dangerous to himself or others.

2. On August 18, 1983, in the United States District Court, District of Massachusetts, respondent was convicted, on his plea of guilty, of:

"Count One: Conspiracy to possess with intent to distribute a Schedule II controlled substance, in violation of Title 21, USC, Sec. 846.

"Count Two: Possession with intent to distribute and distribution of a Schedule II controlled substance, in violation of Title 21, USC, Sec. 841(a)(1) and Title 18, USC, Sec. 2."

The crime of which respondent was convicted is substantially related to the qualifications, functions and duties of a psychologist.

Upon conviction, respondent was sentenced to three years in prison with a "special parole" term of three years.¹

Respondent served two years in federal prison before being released on special parole in 1985. In 1987, after being fined \$25 for a traffic infraction² in Illinois, where he was then living, respondent's special parole was revoked and he was returned to federal prison where he served an additional nine months. On September 7, 1988, respondent was released upon parole with the requirement that he was to remain within the limits of the Central District of California until November 9, 1990. While the record is not clear, it appears respondent was released from parole on that latter date.

3. On February 28, 1994, in the Municipal Court of California, County of Sonoma, respondent was convicted, on his plea of nolo contendere, of a violation of Vehicle Code section 23103.5.

Respondent had been arrested on January 17, 1994 and charged with violating Vehicle Code sections 23152(a) (driving under the influence) and 23152(b) (driving with a blood alcohol level of 0.08 or more). He was also cited for violating Vehicle Code section 5204(a) (failure to display current registration).

After his motion to suppress evidence was denied, respondent entered into a plea bargain with the prosecution that resulted in the dismissal of the two Vehicle Code 23152 counts in exchange for respondent's plea to the Vehicle Code 23103.5 violation, a so-called "wet reckless." The required statement of facts included in support of the new charge showed that the consumption of an alcoholic beverage was involved in the offense. No further facts concerning the offense were contained in the court records.

¹ A "special parole" term is subject to revocation if its terms are violated. Under such circumstances, the original term of imprisonment is increased by the period of the special parole term. The resulting new term of imprisonment is not reduced by time already spent on special parole. Thus, a person whose special parole term is revoked may be required to serve the entire length of the originally-imposed special parole term in prison. (See Title 21, USC, Sec. 841; Title 18, Code of Federal Regulations, Sec. 2.57.)

² Respondent backed into another vehicle, inspected it, then left the scene without leaving his name.

Upon conviction, respondent was fined \$500, placed on 18 months' probation and ordered to complete a First Offender Drinking Driver Program and to submit to chemical testing and search and seizure during the probationary period.

Failure to Disclose Material Facts

4. On or about August 5, 1996, respondent submitted to the Board an application for registration as a psychological assistant dated July 20, 1996. On that application, respondent checked "yes" to the following question:

"Omitting minor traffic violations, have you ever been convicted of or pled guilty or nolo contendere to any violation of any federal or state statute, or any city or county ordinance or any law of a foreign country? This includes all misdemeanors and felonies. Any conviction which has been dismissed under Section 1203.4 of the Penal Code must also be disclosed. If yes, complete the statement form on pages 5 and 6 of this application."

On the statement form, respondent disclosed that in 1982 he had been convicted in federal court of possession of cocaine with the intent to distribute. On the line following "Dates of Imprisonment," respondent wrote "9/82 - 9/84," and on the line following "Dates of Parole," respondent wrote "9/94 - 11/90." Respondent did not disclose his 1994 "wet reckless" or any other convictions.

5. Complainant asserts that respondent failed to disclose material facts on his 1996 application when he did not reveal his 1994 "wet reckless" conviction and when he listed his dates of imprisonment for the drug offense as "9/82 - 9/84" without disclosing that he also served time in prison, when his special parole was revoked, from December 3, 1987 to September 7, 1988.

6. Respondent maintains he never intended to conceal pertinent information from the Board. Respondent points out that on October 8, 1996, before the Board took action on the application for registration as a psychological assistant,³ he provided the

³ On October 25, 1996, the Board notified respondent that his application was denied pursuant to Business and Profession Code sections 480(a)(1) (conviction of a crime) and 480(a)(3) (doing an act which if done by a licensee would be grounds for suspension or revocation of a license). Respondent requested a hearing and a statement of issues was issued asserting respondent's application was subject to denial pursuant to Business and Professions Code sections 480(c) and 2960(3) because he failed to disclose a material fact by not revealing his 1994 conviction for reckless driving; 2960(a) because of his 1982 drug conviction; and 2960(b) because he had used drugs or alcohol in a manner

Board additional information relating to the application, including a seven-page "Personal Statement." In that statement, respondent admitted to theft at the age of 10, drug use beginning in the 8th grade, dealing drugs on his high school campus, being "seriously addicted to cannabinal and methamphetamine" while in the military, a check forgery charge, a drug overdose in 1974, car theft and, finally, his arrest for the sale of cocaine. Also included in respondent's October 8, 1996 submission to the Board was a certificate of parole showing he was released on parole on September 7, 1988 and a copy of the judgment of probation/commitment order relating to the underlying drug conviction.

Concerning the 1994 reckless driving conviction, respondent admits he cannot fully explain why he did not report it either on the application or in his subsequent personal statement. He recalls that he was focused on the drug offense, which he knew would be of greatest concern to the Board, and that he viewed the traffic conviction as "a very minor piece" of his "evolution." Respondent further testified he had no reason to hide this conviction since he knew from his work with criminal offenders that his entire criminal history would show up as a result of his having filed a fingerprint card with the Board.

7. Respondent's failure to reveal his additional nine months of imprisonment from December 1987 to September 1988 was neither an intentional nor a material misrepresentation. In response to the question on the application concerning convictions respondent checked "yes" and on the required statement form truthfully revealed that he had been convicted of a very serious drug offense. While he misstated the dates of imprisonment, it was the fact of the drug conviction itself, not the actual dates of imprisonment, that was material. Generally, a fact is material if there is a substantial likelihood that a reasonable person would consider it important in evaluating an applicant's fitness for a license.⁴ Or, as a court in another state put it, a material representation is one that is "so substantial and important" as to influence the party to whom it was made.⁵ Respondent's dates of imprisonment might well have been of interest to the Board, in that he was been imprisoned for 33 months instead of 24 months. Whether this would influence the Board was a matter for it to determine.

or to an extent dangerous to himself. The statement of issues was subsequently withdrawn in July 1997 when respondent withdrew his application for registration as a psychological assistant.

⁴ See *People v. Hedgecock* (1990) 51 Cal.3d 395, 406. Although this case involved a perjury prosecution based upon a failure to comply with the Political Reform Act, the court's reasoning applies equally to a licensing action.

⁵ *McGuire v. Gumm*, 133 Kan. 422, 300 P. 654, 656.

In addition, it is clear that respondent completed the statement form without having court documents before him. He reported he was convicted in March 1982 and was imprisoned from September 1982 to September 1984. Actually, he was convicted in August 1983 and was in prison from 1983 to 1985. Interestingly, respondent reported he was on parole for six years, from 1984 to 1990 when, in fact, he was on parole for only five years, from 1985 to 1990. In sum, respondent made a good faith disclosure of his drug conviction and resulting incarceration and parole. The fact that he revealed in the personal statement subsequently included with his application numerous facts concerning his background including long-term drug use and illegal activities clearly demonstrates that respondent's failure to reveal that he was sent back to prison for a period as the result of a traffic violation was due to inadvertence and was not intended to deceive or mislead the Board.

8. a. Respondent's failure to disclose his 1994 "wet reckless" conviction constituted a knowing false statement of fact required to be revealed on his application. Respondent clearly knew he had suffered a conviction, even though he may have considered it a minor part of his history. His testimony that he considered the conviction to be only of a traffic violation, and not of a misdemeanor, is both unconvincing and inconsistent with his stated knowledge that the conviction would appear on his criminal record.

b. However, respondent's failure to disclose the conviction did not constitute fraud or deception in applying for a license. While respondent knew he was required to report all misdemeanor convictions, and while he knew he had suffered the 1994 conviction, it cannot be found that he failed to report the conviction with the intent to deceive the Board. Respondent had reported on the application and personal statement not only his serious drug conviction but also an extensive background of drug use and criminal behavior. He knew a check of his fingerprints would reveal his entire criminal record. Considering those factors, it is clear that respondent's failure to reveal his conviction was due to negligence or inadvertence, not to an intention to deceive.

Drug Use and Conviction

9. As set forth in Finding 2, above, respondent was convicted in 1983 of possessing a controlled substance with intent to distribute. The conviction resulted from respondent's sale of cocaine to an undercover agent.⁶ Respondent was at the time 26 years old and had been using drugs for over ten years.

⁶ Although respondent testified the arrest occurred in 1981, considering the discrepancies in dates discussed in Finding 7 it is more likely that the arrest occurred in 1982. For purposes of this decision, the arrest is presumed to have occurred in that year.

Respondent began using and selling drugs while he was still in high school. His drug use continued after he joined the Air Force, a time that marked one of his heaviest drug abuse periods. By his own admission, respondent was then "seriously addicted" to both marijuana and methamphetamine. His drug abuse continued after he was discharged from the military, leading him to become involved in check forgery to finance his habit. It was during this time that he suffered a drug overdose. Respondent admits that he then had a "significant problem" with a wide variety of drugs. After he returned to his hometown, respondent went through a period of homelessness before finding a job and marrying. But his wife was also a drug user and respondent's abuse continued despite working and attending school. Respondent became involved in car theft to support his family and drug habit. Respondent took a job working with "at-risk street kids" and managed to keep his past and current drug use and abuse a secret, developing a "sophisticated illusion" that he could continue to use drugs and still have a good life, until his 1982 arrest for the sale of cocaine.

10. Respondent's arrest proved to be his "personal rock bottom." While in prison he took classes, worked on projects and tried to be "a model troop." He began serving his prison sentence in Danbury, Connecticut in what he frankly describes as a "country club" facility. After about a year, he transferred to a facility in Terre Haute, Indiana, in part to be closer to his father in Illinois and in part because of the additional educational opportunities available there. When he was discharged on special parole, respondent lived in a halfway house in Indianapolis for 60 days before getting a job and moving out. He returned to Illinois where, in 1987, a minor traffic infraction led to revocation of his special parole and a return to Terre Haute for an additional nine months. Upon his discharge in 1988, respondent was sent to California with the requirement that he remain there until completion of his parole.

11. While at the halfway house in Indianapolis, respondent participated in NA/AA. He adheres to the tenet of that program that "once addicted, always addicted," but he does not believe he has a current drug problem. In fact, respondent testified that he has not used controlled substances since his arrest on the drug charge. That testimony is fully supported by the evidence presented. While it is true that respondent admitted that he was able to keep his drug abuse secret during the late '70s and early '80s, he has for at least the past eight years worked with very knowledgeable professionals who have seen no evidence whatsoever of any drug use. The likelihood that respondent could have kept current drug use a secret from these professionals is virtually nil.

--MFCC Laurence Horowitz, Ph.D., has known respondent for at least eight years, first as mentor and chairman of respondent's master's program, later as adjunct faculty in his doctoral work and currently as a colleague at the Ananda Institute. He also knows respondent socially. He has never seen any behavior by respondent indicative of drug use.

--Psychologist John M. Dykman, Ph.D., was the director of intern training at Kaiser, Vallejo when respondent was an intern there from September 1995 through June 1996. He testified there was never even an intimation respondent had a problem with substance abuse.

--Psychologist Joaquin Sanchez, Ph.D., is director of Counseling and Psychological Services at Sonoma State University. The program provides counseling both to students and to faculty and staff. Dr. Sanchez began supervising respondent as an intern in the program in August 1997. When he learned of respondent's criminal record around December 1997, Dr. Sanchez became particularly vigilant in looking to see if there were any present indications of substance abuse. He saw none.

--The testimony of these professional colleagues is echoed by the testimony of paralegal Lisa Robinson. She has known respondent for nine years, beginning with an 18-month intimate relationship. Ms. Robinson testified that from the time she met respondent "he was adamantly opposed to any kind of drug use" and she has never seen him use drugs.

12. Respondent completed his master's program in 1991 with a grade point average of 4.0, thereby demonstrating a level of performance seemingly inconsistent with ongoing substance abuse. In addition to the professional and volunteer positions he now holds as discussed in Findings 19 through 21, below, respondent teaches three 90-minute martial arts classes each week and works out two and a half hours each day. Both of those activities are also inconsistent with continued substance abuse.

13. While respondent clearly has a long history of having used drugs in a manner and to an extent dangerous to himself and others, the evidence is clear that his drug abuse ended 16 years ago and is now something of the distant past.

Alcohol Use and Conviction

14. Respondent describes the circumstances that led to his 1994 "wet reckless" conviction as follows: He and a friend decided to go for a ride on their motorcycles after work on a Friday. Before going on the ride, respondent had one glass of wine. Respondent was stopped by a CHP officer because he had an expired registration tag, not because of the manner in which he was driving. He began looking through his saddle bags for his license and a letter saying he had sent in the registration fees. Because the officer had not asked him to do this, they got "off on the wrong foot." The officer became more negative to respondent and respondent began to ask about his rights. When the officer asked respondent if he had been drinking, respondent said he had had one glass of wine. The officer then administered a field sobriety test, including

a balance test. Respondent, a martial arts expert, admittedly became "arrogant" during this test and began exhibiting martial arts moves. Respondent believes that at this point he may have passed the field sobriety test but "lost the attitude test." He was arrested and taken to the Santa Rosa Police Department where two breathalyzer tests were administered. Respondent recalls being told his blood alcohol level was 0.11%.

Respondent's driver's license was suspended at the time of the arrest. He subsequently had a DMV hearing on the suspension, with the result being that his license remained suspended for an additional four months.

15. Respondent concedes that his entry of a plea of nolo contendere is conclusive proof that he committed the crime of which he was convicted. He nevertheless argues that this does not demonstrate that he used alcohol to an extent dangerous to himself or others. In particular, respondent maintains there was no evidence presented to show that his blood alcohol level exceeded 0.08%, the legal limit for intoxication, or that his driving ability was impaired.

Respondent's arguments are without merit. First, while it is true no evidence was presented at the hearing to show respondent's actual blood alcohol level, an inference may be drawn that it exceeded 0.08%. Respondent testified that after a DMV hearing, his license remained suspended for an additional four months. Such a suspension would occur only if respondent's blood alcohol level exceeded 0.08%.⁷ Second, reckless driving is defined as driving "upon a highway in willful or wanton disregard for the safety of persons or property"⁸ A conviction of Vehicle Code section 23103.5, a "wet reckless," essentially requires that a defendant plead to a violation of reckless driving and that the record state whether alcohol or drugs were involved. In respondent's case, the statement of facts respondent signed specifically shows that alcohol was involved. Thus, respondent's conviction conclusively shows that on January 17, 1994 he used alcohol in a manner dangerous to himself or the public regardless of whether or not his blood alcohol level exceeded 0.08%.

16. Respondent testified that the only alcohol he drinks is wine. He typically has wine with dinner on Sunday night, and occasionally on Friday night. He does not drink alone, nor does he drink in the morning. Dr. Horowitz, who has known respondent professionally and socially for at least eight years, has never known respondent to drink more than an occasional glass of wine. Ms. Robinson, who has known respondent for nine years, has shared wine with him at dinner or in the evening, but has never known him to abuse alcohol. Neither Dr. Dykman, Dr. Horowitz, Dr. Sanchez or psychologist

⁷ See Vehicle Code sections 13353.2(a)(1) and 13353.3(b)(1).

⁸ Vehicle Code section 23103(a).

Marilyn Lindsey Mullins, Ph.D., who supervised respondent during his Kaiser internship during the 1995-96 academic year, have observed respondent at any time to have been under the influence of alcohol or to have been otherwise impaired by substance use.

17. Based upon all the evidence presented it is found that respondent's use of alcohol in a manner dangerous to himself or the public on January 17, 1994 was an isolated incident that demonstrated neither a continuing use of alcohol in a dangerous manner nor a propensity to such use.

Respondent's Background/Rehabilitation

18. Respondent received a bachelor of science degree in psychology from Bridgewater State College in Massachusetts in 1982. He received his master of arts degree in psychology from Sonoma State University in 1991. Respondent received his Psy.D. degree in 1997 from the California School of Professional Psychology in Alameda.

19. Since shortly after his release from parole in 1990 respondent has maintained continuous employment in the counseling field. He has been employed since 1991 as a staff therapist and consultant at the Ananda Institute in Santa Rosa. In that position, respondent provides counseling and assessment services to individuals, families and couples. Since 1997, respondent has also served as program director for the Ananda Institute's Domestic Violence Treatment Program. He is responsible for the overall development, implementation and administration of an intervention treatment program for batterers.

From 1991 through 1997, respondent also worked as a part-time lecturer in the psychology department at Sonoma State University. Since mid-1997, respondent served as a post-doctoral intern at Sonoma State University. He provides counseling and consultative services to employees and students under the Employee Assistance Program and the Student Counseling Resource Center. In addition, respondent serves as primary liaison to the residence halls, providing conflict resolution and assessment services to students and staff.

In addition, respondent works with Bay Area Wellness, a group that conducts neuropsychiatric evaluations in skilled nursing facilities.

20. During the course of his doctoral work, respondent undertook a number of therapy internships. From September 1993 to June 1994 he worked as a therapy intern at Sonoma County Mental Health, Petaluma Outreach, providing child and adult therapy and testing and assessment of adults. In the following academic year, respondent was an intern therapist and clinical case manager at Sonoma County Mental Health, Adult

Integrated Services. There, he conducted placement evaluations and assessments as well as complete psychodiagnostic assessments. During the 1995-96 academic year, respondent undertook a dual internship in the Department of Psychiatry at Kaiser, Vallejo. One internship was in psychotherapy, the other in chemical dependency. In addition to providing diagnostic and therapeutic services, respondent acted as co-facilitator for groups addressing issues of alcohol and substance abuse and co-dependency.

21. Respondent has also shown extensive community involvement. He was a founding member of the Valley of the Moon Children's Foundation and the Redwood Center for Sexually Abused Children, which provides temporary emergency care and shelter for abused children. Since August 1996, respondent has served as chairperson of the foundation, which provides support services and education for abused and neglected children and their families. Respondent was also a founding member, and subsequently co-chair, of the Sonoma County Multi-Agency Resource Team, which was dedicated to developing a multi-agency, multi-disciplinary approach to providing services for at-risk youth and their families. Substance and alcohol abuse was one area of particular emphasis for the team. Finally, respondent also served as president of Kids Street Theater, which provides enrichment for homeless and abused children.

22. As indicated in Finding 11, above, while he was in a halfway house in Indianapolis respondent participated in an NA/AA program. Respondent successfully completed the First Offender Drinking Driver Program required as a result of his 1994 conviction. He also successfully completed all other terms of his criminal probation. In the fall of 1994, respondent completed at the California School of Professional Psychology the state-mandated course in chemical dependency and treatment. As indicated in Finding 20, respondent undertook a post-doctoral internship in chemical dependency in the 1995-96 academic year. Respondent's work at the Ananda Institute and for Sonoma State University, in the Employee Assistance Program, the Student Counseling Resource Center and the residence halls, all involve substance abuse work. As a result of all this, it is clear that respondent is well-armed with knowledge about substance abuse.

Cost Recovery

23. As indicated in the preamble, the Board has withdrawn its request for recovery of costs in this matter.

DETERMINATION OF ISSUES

First Cause for Denial

1. Finding 7: No cause for denial of respondent's application exists pursuant to Business and Professions Code sections 480(c) and 2960(e) in that he did not knowingly make a false statement of fact required to be revealed in his application, nor did he use fraud or deception in applying for registration as a psychological assistant, when he failed to disclose all dates of his imprisonment.

2. Finding 8a: Cause for denial of respondent's application exists pursuant to Business and Professions Code section 480(c) in that he knowingly made a false statement of fact required to be revealed in his application when he failed to disclose his 1994 conviction.

3. Finding 8b: No cause for denial of respondent's application exists pursuant to Business and Professions Code section 2960(e) in that he did not use fraud or deception in applying for registration as a psychological assistant when he failed to disclose his 1994 conviction.

Second Cause for Denial

4. Finding 2: Cause for denial of respondent's application exists pursuant to Business and Professions Code section 2960(a) in that he was convicted of a crime substantially related to the qualifications, functions and duties of a psychologist. However, considering that 16 years have passed since respondent's conviction, a period during which he has remained drug-free and has made significant changes in his life, it is determined that respondent's application should not be subject to denial based upon that conviction.

Third Cause for Denial

5. Finding 9: Cause for denial of respondent's application exists pursuant to Business and Professions Code section 2960(b) in that he used controlled substances to an extent or in a manner dangerous to himself or others. However, the matters set forth in Findings 11 through 13 fully mitigate this cause for denial since they demonstrate that respondent's misuse of controlled substances ended 16 years ago. Thus, while technical cause for denial exists, it is determined that in the interests of justice respondent's application should not be subject to denial on this basis.

6. Finding 15: Cause for denial of respondent's application exists pursuant to Business and Professions Code section 2960(b) in that he used alcohol in a manner

dangerous to himself or others. The matters set forth in Findings 16 and 17 tend to mitigate this cause for denial since they demonstrate that respondent's misuse of alcohol was an isolated incident. However, because of both the recency of respondent's conduct and his unwillingness to accept the fact that his driving may have been impaired by alcohol consumption, it is determined that the isolated nature of the incident does not fully mitigate the cause for denial.

Other Matters

7. Respondent's license is thus subject to denial on two bases: his knowing misstatement of fact on his application regarding his 1994 conviction and his use of alcohol in a dangerous manner on January 17, 1994. While both of these are serious matters that should not be understated, respondent has presented substantial evidence to demonstrate that he would not pose a danger to the public should he be granted registration as a psychologist. Nevertheless, because of his misstatement of fact and his misuse of alcohol, prudence dictates that the registration be issued on a probationary basis upon terms and conditions sufficient to allow the Board to more closely monitor respondent's performance and conduct.

8. The Board's disciplinary guidelines have been adopted as a regulation in Title 16, California Code of Regulations section 1397.12.⁹ That section, and the guidelines themselves, recognize that deviation from the guidelines is appropriate if the facts of the case warrant. The facts of this case clearly warrant deviation from the guidelines in a number of respects.

As indicated above (Determination of Issues 2, 6 and 7), respondent's application is subject to denial under Business and Professions Code sections 480(c) and 2960(b). The Board's guidelines provide no specific conditions to be imposed relative to section 480(c). Regarding section 2960(b), the guidelines call for a minimum probationary period of five years with terms that include an actual suspension, a physical examination if appropriate, a practice monitor, an oral examination, participation in an alcohol treatment program and continuing therapy, and biological fluid testing.

⁹ "In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.), the Board of Psychology shall consider the disciplinary guidelines entitled 'Disciplinary Guidelines as amended 7/1/96' which are hereby incorporated by reference. Deviation from these guidelines and orders, including the standard terms of probation is appropriate where the Board of Psychology in its sole discretion determines that the facts of the particular case warrant such a deviation--for example: the presence of mitigating factors; the age of the case; evidentiary problems."

Because respondent's single use of alcohol in a dangerous manner does not demonstrate that he has an alcohol abuse problem or that his ability to safely provide psychological services to patients is impaired, the probationary terms need not include an actual suspension, a physical examination, a practice monitor, an oral examination, participation in an alcohol treatment program or continuing therapy. However, to ensure that respondent does not use alcohol when he is engaged in the practice of psychology, a condition requiring random fluid testing should be included. This condition, which includes a prohibition against the use of alcohol, need remain in effect only for the first two years of probation.

9. One of the Board's standard terms of probation is the requirement that the licensee pay the monetary costs associated with the monitoring or probation. Although respondent concedes the Board may issue a license or registration upon terms and conditions, he asserts that those terms and conditions may not include payment of monitoring or probationary costs. This assertion is found to be without merit.

Business and Professions Code section 2960 authorizes the Board in a disciplinary action to refuse to issue a registration or license or "to issue a registration or license with terms and conditions." Section 2964.6 provides: "An administrative disciplinary decision that imposes terms of probation may include, among other things, a requirement that the licensee who is being placed on probation pay the monetary costs associated with monitoring the probation."

When read in conjunction with section 2960, the clear intent of section 2964.6 is to allow the Board to collect the costs associated with monitoring probation from all probationary licensees, whether they are existing licensees "being placed on probation" or applicants being granted an initial license "on probation." There is no statutory or rational basis either for treating the probationary cost reimbursement condition differently than any other probationary terms or for imposing the monitoring cost requirement upon existing licensees but not upon new licensees.

ORDER

The application of Michael Anthony Fraga for registration as a psychologist is denied pursuant to Determinations 2 and 6; provided, however, that denial is stayed for five (5) years and respondent shall be issued a probationary psychologist registration upon the following terms and conditions:

1. Respondent shall abstain completely from the personal use or possession of controlled substances as defined in the California Uniform Controlled Substances Act, and dangerous drugs as defined by Section 4211 of the Business and Professions Code, or

any drugs requiring a prescription unless respondent provides the Board or its designee with documentation from the treating physician and surgeon that the prescription was legitimately issued and is a necessary part of the treatment of respondent.

For the first two (2) years of probation, respondent shall abstain completely from the use of alcoholic beverages. During this period, respondent shall undergo random, biological fluid testing as determined by the Board or its designee. Any confirmed positive finding will be considered a violation of probation. Respondent shall pay all costs associated with such testing. The frequency of this testing condition will be determined by the Board or its designee.

Orders forbidding respondent from personal use or possession of controlled substances or dangerous drugs do not apply to medications lawfully prescribed to respondent for a bona fide illness or condition by a physician and surgeon. Respondent shall provide the Board or its designee with written documentation from the treating physician and surgeon who prescribed medication(s).

2. Respondent shall take and successfully complete not less than one course each year of probation in the area of substance abuse. Coursework must be preapproved by the Board or its designee. All coursework shall be taken at the graduate level at an accredited educational institution or by an approved continuing education provider. Classroom attendance is specifically required; correspondence or home study coursework shall not count toward meeting this requirement. The coursework must be in addition to any continuing education courses that may be required for license renewal.

Within 90 days of the effective date of this Decision, respondent shall submit to the Board or its designee for its prior approval a plan for meeting the educational requirements. All costs of the coursework shall be paid by the respondent.

3. Within 90 days of the effective date of this Decision, respondent shall submit to the Board or its designee for prior approval a course in laws and ethics as they relate to the practice of psychology. Said course must be successfully completed at an accredited educational institution or through a provider approved by the Board's accreditation agency for continuing education credit. Said course must be

taken and completed within one year from the effective date of this Decision. The cost associated with the law and ethics course shall be paid by the respondent.


4. Respondent shall pay the costs associated with probation monitoring each and every year of probation. Such costs shall be payable to the Board of Psychology at the end of each fiscal year. Failure to pay such costs shall be considered a violation of probation.
5. Respondent shall obey all federal, state, and local laws and all regulations governing the practice of psychology in California including the ethical guidelines of the American Psychological Association. A full and detailed account of any and all violations of law shall be reported by the respondent to the Board or its designee in writing within seventy-two (72) hours of occurrence.
6. Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board or its designee, stating whether there has been compliance with all the conditions of probation.
7. Respondent shall comply with the Board's probation program and shall, upon reasonable notice, report to the assigned District Office of the Medical Board of California or other designated probation monitor. Respondent shall contact the assigned probation officer regarding any questions specific to the probation order. Respondent shall not have any unsolicited or unapproved contact with 1) complainants associated with the case; 2) Board members or members of its staff; or 3) persons serving the Board as expert evaluators.
8. Respondent shall appear in person for interviews with the Board or its designee upon request at various intervals and with reasonable notice.
9. Respondent shall notify the Board in writing, through the assigned probation officer, of any and all changes of employment, location, and address within 30 days of such change.
10. In the event respondent should leave California to reside or to practice outside the State or for any reason should respondent stop practicing psychology in California, respondent shall notify the Board or its designee in writing within ten days of the dates of

departure and return or the dates of non-practice within California. Non-practice is defined as any period of time exceeding thirty days in which respondent is not engaging in any activities defined in Sections 2902 and 2903 of the Business and Professions Code. Periods of temporary or permanent residency or practice outside California or of non-practice within California will not apply to the reduction of this probationary period.

11. If respondent is licensed as a psychologist, he shall not employ or supervise or apply to employ or supervise psychological assistants, interns or trainees during the course of this probation. Respondent shall terminate any such supervisorial relationship in existence on the effective date of this probation.
12. If respondent is currently registered as a psychological assistant and subsequently obtains other psychological assistant registrations or becomes licensed as a psychologist during the course of this probationary order, respondent agrees that this Decision shall remain in full force and effect until the probationary period is successfully terminated.
13. If respondent violates probation in any respect, the Board may, after giving respondent notice and the opportunity to be heard, revoke probation and carry out the disciplinary order that was stayed. If an Accusation or Petition to Revoke Probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final. No Petition for Modification or Termination of Probation shall be considered while there is an Accusation or Petition to Revoke Probation pending against respondent.
14. Upon successful completion of probation, respondent's license shall be fully restored.

DATED: September 14, 1998

EFFECTIVE: Upon meeting the
requirements for registration
as a registered psychologist



JUDITH JANARO FABIAN, Ph.D.
Vice Chairperson
Board of Psychology